UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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DORCAS-COTHY KABASELE, an individual,[1]

Plaintiff,

v.

ULTA SALON, COSMETICS & FRAGRANCE, INC.; and DOES 1-100, inclusive,

Defendant.

No. 2:21-cv-1639 WBS CKD

MEMORANDUM AND ORDER RE: PLAINTIFF'S MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION AND PAGA SETTLEMENT

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Plaintiff Dorcas-Cothy Kabasele, individually and on behalf of similarly situated individuals, brought this putative class action against defendant Ulta Salon, Cosmetics, & Fragrance, Inc. ("Ulta"), alleging violations of California wage and hour laws. (See Third Am. Compl. ("TAC") (Docket No. 23).)

[1] Although the caption on the operative complaint refers to plaintiff only as "an individual," plaintiff asserts claims both individually and on behalf of similarly situated Ulta employees.

Before the court is plaintiff's unopposed renewed motion for preliminary approval of a class action settlement. (See Mot. for Prelim. Approval ("Mot.") (Docket No. 44); Def.'s Notice of Non-Opp'n (Docket No. 45).)

I. Background and Proposed Settlement

Defendant Ulta employed plaintiff and other proposed class members as hourly-paid or non-exempt employees. (See TAC ¶ 10.) Plaintiff brought this action for (1) failure to pay minimum wages; (2) failure to pay overtime wages; (3) failure to provide meal breaks; (4) failure to provide rest breaks; (5) failure to pay sick pay; (6) failure to furnish accurate itemized wage statements; (7) failure to pay wages due at end of employment; (8) failure to indemnify all necessary business expenditures; (9) violation of California's Unfair Competition Law, California Business & Professions Code § 17200 et seq.; and (10) penalties under California's Private Attorneys General Act of 2004 ("PAGA"), Cal. Lab. Code § 2698 et seq. (See TAC.)

This is one of four actions against defendant Ulta covering similar class and PAGA claims. The other actions are Gonzalez v. Ulta Salon Cosmetics & Fragrance, Inc., No. 2:22-cv-00363 AB RAO (C.D. Cal.), a federal class and PAGA action; Arellano v. Ulta Salon, Cosmetics and Fragrance, Inc., No. 5:22-cv-00639 JGB KK (C.D. Cal.), a federal class action; and Arellano v. Ulta Salon, Cosmetics and Fragrance, Inc., No. CIVSB2209151 (San Bernardino Super. Ct.), a state PAGA action.

The proposed settlement disposes of all four actions.[2]

[2] Plaintiff's motion seeks leave to amend the operative complaint to join the named plaintiffs from these other actions.

All parties agreed to seek settlement approval only in this action; once the settlement receives final approval in this action and all class payments are distributed, counsel in the Gonzalez and Arellano actions (state and federal) will voluntarily dismiss their cases. (See Settlement Agreement (Docket No. 34-2 at 18-53) ¶ 9.8.)

The putative class consists of all current and former hourly-paid or non-exempt employees who worked for defendant Ulta within California between October 12, 2019 and November 8, 2022. (Id. ¶ 1.6.) There are approximately 18,711 individuals in the putative class. (Mot. at 1; Decl. of Robert J. Wasserman ("Wasserman Decl.") ¶ 15.) The parties propose a gross settlement amount of $1,500,000, which covers all four actions and includes the following: (1) $5,000 incentive awards for the three lead plaintiffs and $500 for each remaining named plaintiff, for a total of $27,000 in plaintiff incentive awards; (2) maximum attorneys' fees of $500,000, or 33.33% of the gross settlement amount; (3) settlement administration costs of approximately $65,000; and (4) $50,000 for PAGA penalties, of which 75% (i.e., $37,500) will be distributed to the Labor and Workforce Development Agency ("LWDA") and the remaining 25% will be distributed to individual aggrieved employees. (See Settlement Agreement ¶¶ 1.5, 1.13, 1.16, 1.21, 1.31; Mot. at 7-9.) After deduction of the incentive awards, fees, costs, and the LWDA's share of penalties, the net settlement amount would be approximately $870,500, to be distributed to class members pro

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The court will grant leave to amend the operative complaint.

rata based on their number workweeks during the class period. (See id.)

The settlement would release defendant from any and all class claims that were pled or could have been pled based on the factual allegations in the operative or prior complaints, and any and all PAGA claims for civil penalties premised on the released class claims. (See id. ¶¶ 1.26, 1.27.)

A hearing on the first motion for preliminary approval was set for March 6, 2023. Due to an error in the briefing identified by counsel during the hearing, the court declined to hear further oral argument at that time. The court subsequently issued an order explaining its evaluation of the initial briefing and ordered the parties to submit supplemental briefing. See Kabasele v. Ulta Salon, Cosmetics, & Fragrance, Inc., No. 2:21-cv-01639 WBS CKD, 2023 WL 2842973, at *2 (E.D. Cal. Mar. 14, 2023). Following supplemental briefing, the court denied the motion, indicating that the parties needed to provide adequate factual support for the figures and calculations they relied upon in arguing that the settlement was fair and adequate. (See Docket No. 43.)

II. Discussion

Federal Rule of Civil Procedure 23(e) provides that "[t]he claims, issues, or defenses of a certified class may be settled . . . only with the court's approval." Fed. R. Civ. P. 23(e). This Order is the first step in that process and analyzes only whether the proposed class action settlement deserves preliminary approval. See Murillo v. Pac. Gas & Elec. Co., 266 F.R.D. 468, 473 (E.D. Cal. 2010) (Shubb, J.). Preliminary

approval authorizes the parties to give notice to putative class members of the settlement agreement and lays the groundwork for a future fairness hearing, at which the court will hear objections to (1) the treatment of this litigation as a class action and (2) the terms of the settlement. See id.; Diaz v. Tr. Territory of Pac. Islands, 876 F.2d 1401, 1408 (9th Cir. 1989). The court will reach a final determination as to whether the parties should be allowed to settle the class action on their proposed terms after that hearing.

Where the parties reach a settlement agreement prior to class certification, the court must first assess whether a class exists. Staton v. Boeing Co., 327 F.3d 938, 952 (9th Cir. 2003). "Such attention is of vital importance, for a court asked to certify a settlement class will lack the opportunity, present when a case is litigated, to adjust the class, informed by the proceedings as they unfold." Id. (quoting Amchem Prods. Inc. v. Windsor, 521 U.S. 591, 620 (1997)). The parties cannot "agree to certify a class that clearly leaves any one requirement unfulfilled," and consequently the court cannot blindly rely on the fact that the parties have stipulated that a class exists for purposes of settlement. See Amchem, 521 U.S. at 621-22.

"Second, the district court must carefully consider 'whether a proposed settlement is fundamentally fair, adequate, and reasonable,' recognizing that '[i]t is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness . . . .'" Staton, 327 F.3d at 952 (quoting Hanlon v. Chrysler Corp., 150 F.3d 1011, 1026 (9th Cir. 1998)), overruled on other grounds by Wal-Mart Stores, Inc.

v. Dukes, 564 U.S. 338 (2011). District courts "review and approve" settlement of PAGA claims under a similar standard. See Cal. Lab. Code § 2669(k)(2); Jordan v. NCI Grp., Inc., No. cv-161701 JVS SP, 2018 WL 1409590, at *2 (C.D. Cal. Jan. 5, 2018) (collecting cases); Ramirez v. Benito Valley Farms, LLC, No. 16-cv-04708 LHK, 2017 WL 3670794, at *2 (N.D. Cal. Aug. 25, 2017).

A. Class Certification

The putative class consists of all current and former hourly-paid or non-exempt employees who worked for defendant Ulta within California between October 12, 2019 and November 8, 2022.[3] (Settlement Agreement ¶ 1.6.)

To be certified, the putative class must satisfy the requirements of Federal Rules of Civil Procedure 23(a) and 23(b). Leyva v. Medline Indus. Inc., 716 F.3d 510, 512 (9th Cir. 2013).

1. Rule 23(a)

Rule 23(a) restricts class actions to cases where: "(1) the class is so numerous that joinder of all members is impracticable [numerosity]; (2) there are questions of law or fact common to the class [commonality]; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class [typicality]; and (4) the representative parties will fairly and adequately protect the interests of the class [adequacy of representation]." See Fed. R. Civ. P. 23(a).

a. Numerosity

"A proposed class of at least forty members

[3] For purposes of the PAGA claim, the relevant time period is August 24, 2020 through November 8, 2022 ("PAGA Period").

presumptively satisfies the numerosity requirement." Avilez v. Pinkerton Gov't Servs., 286 F.R.D. 450, 456 (C.D. Cal. 2012), vacated on other grounds, 596 F. App'x 579 (9th Cir. 2015). See also, e.g., Collins v. Cargill Meat Sols. Corp., 274 F.R.D. 294, 300 (E.D. Cal. 2011) (Wanger, J.) ("Courts have routinely found the numerosity requirement satisfied when the class comprises 40 or more members."). Here, plaintiff estimates that the proposed class contains 18,711 members. (See Mot. at 1; Wasserman Decl. ¶ 15.) This more than satisfies the numerosity requirement.

b. Commonality

Commonality requires that the class members' claims "depend upon a common contention" that is "capable of classwide resolution -- which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." Wal-Mart Stores, 564 U.S. at 350. "[A]ll questions of fact and law need not be common to satisfy the rule," and the "existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." Hanlon, 150 F.3d at 1019. "So long as there is even a single common question, a would-be class can satisfy the commonality requirement of Rule 23(a)(2)." Wang v. Chinese Daily News, Inc., 737 F.3d 538, 544 (9th Cir. 2013) (internal citation and quotation marks omitted).

Here, the claims implicate common questions of law and fact because they are premised on policies and practices that allegedly applied to all class members equally. All class members were hourly-paid or non-exempt employees who worked for

defendant Ulta within California between October 12, 2019 and November 8, 2022. (See Settlement Agreement ¶ 1.6.) As a result, the class members share several common factual questions surrounding the existence of alleged wage and hour policies (including, inter alia, failure to pay minimum wages, failure to provide overtime compensation, and deprivation of meal and rest periods), and several common legal questions concerning whether said policies violated California law. (See TAC ¶¶ 55-111.)

Generally, "challeng[ing] a policy common to the class as a whole creates a common question whose answer is apt to drive the resolution of the litigation." Ontiveros v. Zamora, No. 2:08-cv-567 WBS DAD, 2014 WL 3057506, at *5 (E.D. Cal. July 7, 2014). Even if individual members of the class will be entitled to different amounts of damages because, for instance, they were denied fewer meal and rest breaks than other employees or had their time rounded down less often than other employees, "the presence of individual damages cannot, by itself, defeat class certification." Leyva, 716 F.3d at 514 (quoting Wal-Mart Stores, 564 U.S. at 362). Accordingly, these common questions of law and fact satisfy the commonality requirement.

c. Typicality

Typicality requires that named plaintiffs have claims "reasonably coextensive with those of absent class members," but their claims do not have to be "substantially identical." Hanlon, 150 F.3d at 1020. The test for typicality "is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same

course of conduct." Hanon v. Dataproducts Corp., 976 F.2d 497, 508 (9th Cir. 1992) (citation omitted).

The named plaintiff and the other class members were all hourly-paid or non-exempt employees of defendant. Plaintiff and the other class members were all allegedly subject to the same policies and practices in question, including failure to pay minimum wages, failure to provide overtime compensation, and deprivation of meal and rest periods. Although the facts might differ for individual class members, the basis for their alleged injuries and the parties purportedly responsible for those injuries are the same. The proposed class therefore meets the typicality requirement.

d. Adequacy of Representation

To resolve the question of adequacy, the court must consider two factors: (1) whether the named plaintiff and her counsel have any conflicts of interest with other class members, and (2) whether the named plaintiff and her counsel will vigorously prosecute the action on behalf of the class. In re Hyundai & Kia Fuel Econ. Litig., 926 F.3d 539, 566 (9th Cir. 2019).

i. Conflicts of Interest

There do not appear to be any conflicts of interest for purposes of preliminary approval. The named plaintiff's interests are generally aligned with those of the putative class members, who suffered injuries similar to those suffered by the named plaintiff. See Amchem, 521 U.S. at 625-26 ("[A] class representative must be part of the class and possess the same interest and suffer the same injury as the class members.").

The settlement provides for $5,000 incentive awards for the three lead plaintiffs and $500 for each remaining named plaintiff. (Settlement Agreement ¶ 1.13.) While the provision of an incentive award raises the possibility that the named plaintiff's interest in receiving that award will cause their interests to diverge from the class's interest in a fair settlement, the Ninth Circuit has specifically approved the award of "reasonable incentive payments." Staton, 327 F.3d at 977–78. The court, however, must "scrutinize carefully the awards so that they do not undermine the adequacy of the class representatives." Radcliffe v. Experian Info. Sys., Inc., 715 F.3d 1157, 1163 (9th Cir. 2013).

Courts have found that "a $5,000 incentive award is 'presumptively reasonable' in the Ninth Circuit." See Roe v. Frito-Lay, Inc., No. 14-cv-00751, 2017 WL 1315626, at *8 (N.D. Cal. Apr. 7, 2017); see also Hopson v. Hanesbrands Inc., 08-cv-0844 EDL, 2009 WL 928133, at *10 (N.D. Cal. Apr. 3, 2009) (citing In re Mego Fin. Corp. Sec. Litig., 213 F.3d 454, 463 (9th Cir. 2000)); Alberto v. GMRI, Inc., 252 F.R.D. 652, 669 (E.D. Cal. 2008) (Shubb, J.). Here, the incentive awards are either $500 or $5,000, placing them within the range typically deemed reasonable within the Ninth Circuit.

The settlement results in an average of $46.52 to be distributed to each class member. The court recognizes that this is significantly less than the proposed $5,000 and $500 incentive awards. However, incentive awards "are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing

the action, and, sometimes, to recognize their willingness to act as a private attorney general." Rodriguez v. West Publ'g Corp., 563 F.3d 948, 958-59 (9th Cir. 2009). Indeed, the Ninth Circuit has consistently recognized incentive awards are "fairly typical" way to "compensate class representatives for work done on behalf of the class" or "to make up for financial or reputational risk undertaken in bringing the action." Id. Plaintiff's counsel represents that the named plaintiff has expended significant time participating in this case and has exposed herself to reputational and professional risks by tying her name to a class action lawsuit against her former employer. (Wasserman Decl. ¶¶ 56-58.) The incentive payments thus appear appropriate at this stage. However, counsel should present further evidence of the efforts of all class representatives receiving incentive awards at final approval.

ii. Vigorous Prosecution

The second portion of the adequacy inquiry examines the vigor with which the named plaintiff and her counsel have pursued the class's claims. "Although there are no fixed standards by which 'vigor' can be assayed, considerations include competency of counsel and, in the context of a settlement-only class, an assessment of the rationale for not pursuing further litigation." Hanlon, 150 F.3d at 1021.

Here, class counsel appear to be experienced employment and class action litigators fully qualified to pursue the interests of the class. (See Wasserman Decl. ¶¶ 62-64; Decl. of Shawn Sassooness ("Sassooness Decl.") (Docket No. 44-2) ¶ 3.) This experience, coupled with the work performed thus far (see

Wasserman Decl. ¶¶ 3-10; Sassooness Decl. ¶¶ 4-8), suggest that class counsel are well-equipped to handle this case. Further, plaintiff's counsel seem to have conducted thorough factual investigation and legal research, and fully considered the strengths and weaknesses of this case in deciding to accept the terms of the proposed settlement agreement. (See Wasserman Decl. ¶¶ 7-10; Sassooness Decl. ¶¶ 7-8.) The court finds no reason to doubt that plaintiff's counsel is well qualified to conduct the proposed litigation and assess the value of the settlement. Accordingly, the court concludes that Rule 23(a)'s adequacy requirement is satisfied for the purpose of preliminary approval.

2. Rule 23(b)

After fulfilling the threshold requirements of Rule 23(a), the proposed class must satisfy the requirements of one of the three subdivisions of Rule 23(b). Leyva, 716 F.3d at 512. Plaintiff seeks certification under Rule 23(b)(3), which provides that a class action may be maintained only if (1) "the court finds that questions of law or fact common to class members predominate over questions affecting only individual members" and (2) "that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

a. Predominance

"The predominance analysis under Rule 23(b)(3) focuses on 'the relationship between the common and individual issues' in the case and 'tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.'" Wang, 737 F.3d at 545 (quoting Hanlon, 150 F.3d at 1022).

As discussed above, the claims brought by the proposed settlement class all arise from defendant's same conduct with respect to wage and hour policies for hourly-paid and non-exempt employees. The class claims thus demonstrate a "common nucleus of facts and potential legal remedies" that can properly be resolved in a single adjudication. See Hanlon, 150 F.3d at 1022. Although there are differences in the facts pertaining to individual class members and the amount of injury sustained, there is no indication that those variations are "sufficiently substantive to predominate over the shared claims." See Murillo, 266 F.R.D. at 476 (quoting Hanlon, 150 F.3d at 1022). Accordingly, the court finds common questions of law and fact predominate over questions affecting only individual class members.

b. Superiority

Rule 23(b)(3) sets forth four non-exhaustive factors that courts should consider when examining whether "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). They are: "(A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action." Id. The parties settled this action prior to certification, making factors (C) and (D) inapplicable. See Murillo, 266 F.R.D. at 477

(citing Amchem, 521 U.S. at 620).

Rule 23(b)(3) is concerned with the "vindication of the rights of groups of people who individually would be without effective strength to bring their opponents into court at all." Amchem, 521 U.S. at 617. When, as here, class members' individual recovery is relatively modest, the class members' interests generally favor certification. Zinser v. Accufix Res. Inst., Inc., 253 F.3d 1180, 1190 (9th Cir. 2001). Further, while similar actions have been filed in other courts, this global settlement disposes of the claims in those cases. Accordingly, the class action device appears to be the superior method for adjudicating this controversy.

3. Rule 23(c)(2) Notice Requirements

If the court certifies a class under Rule 23(b)(3), it "must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). Rule 23(c)(2) governs both the form and content of a proposed notice. See Ravens v. Iftikar, 174 F.R.D. 651, 658 (N.D. Cal. 1997) (citing Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 172-77 (1974)). Although that notice must be "reasonably certain to inform the absent members of the plaintiff class," actual notice is not required. Silber v. Mabon, 18 F.3d 1449, 1454 (9th Cir. 1994) (citation omitted).

Plaintiff's counsel has provided the court with a proposed notice to class members. (See Docket No. 44-3 at 57-62.) It explains the proceedings, defines the scope of the class, and explains what the settlement provides and how much

each class member can expect to receive in compensation. (See id. at 1-5.) The notice further explains the opt-out procedure, the procedure for objecting to the settlement, and the date and location of the final approval hearing. (See id. at 5-6.) The content of the notice therefore satisfies Rule 23(c)(2)(B). See Fed. R. Civ. P. 23(c)(2)(B); Churchill Vill., L.L.C. v. Gen. Elec., 361 F.3d 566, 575 (9th Cir. 2004) ("Notice is satisfactory if it 'generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard.'") (quoting Mendoza v. Tucson Sch. Dist. No. 1, 623 F.2d 1338, 1352 (9th Cir. 1980)).

The parties have selected Simpluris, Inc. to serve as the Settlement Administrator. (See Mot. at 1.) Pursuant to the notice plan, the Settlement Administrator will provide direct mail notice to each class member at his or her last known address based upon defendant's records, performing additional skip traces to locate other mailing addresses as necessary. (See id. at 23.)

The court cautions counsel that a single mailed notice is unlikely to provide sufficient notice. See Roes, 1-2 v. SFBSC Mgmt., LLC, 944 F.3d 1035, 1045-46 (9th Cir. 2019). As discussed at the hearing on this motion, the court strongly advises that the Settlement Administrator undertake additional measures "reasonably calculated, under all the circumstances," to apprise all class members of the proposed settlement. See id. at 1047 (quoting Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 315 (1950)).

Counsel represented at the hearing on this motion that they would investigate additional notice procedures, which will

be implemented prior to the motion for final approval, if available and appropriate. Given these representations, the court will not deny preliminary approval, notwithstanding its concerns about the parties' notice plan as set forth in the motion for preliminary approval.

B. Preliminary Settlement Approval

After determining that the proposed class satisfies the requirements of Rule 23(a) and (b), the court must determine whether the terms of the parties' settlement appear fair, adequate, and reasonable. See Fed. R. Civ. P. 23(e)(2); Hanlon, 150 F.3d at 1026. This process requires the court to "balance a number of factors," including "the strength of the plaintiff's case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement." Hanlon, 150 F.3d at 1026.

Because some of these factors cannot be considered until the final fairness hearing, at the preliminary approval stage "the court need only determine whether the proposed settlement is within the range of possible approval," Murillo, 266 F.R.D. at 479 (quoting Gautreaux v. Pierce, 690 F.2d 616, 621 n.3 (7th Cir. 1982)), and resolve any "glaring deficiencies" in the settlement agreement before authorizing notice to class members, Ontiveros, 2014 WL 3057506, at *12 (citing Murillo, 266 F.R.D. at 478). This generally requires consideration of

"whether the proposed settlement discloses grounds to doubt its fairness or other obvious deficiencies, such as unduly preferential treatment of class representatives or segments of the class, or excessive compensation of attorneys." Murillo, 266 F.R.D. at 479 (quoting West v. Circle K Stores, Inc., 04-cv-438 WBS GGH, 2006 WL 1652598, at *11-12 (E.D. Cal. June 13, 2006)).

Courts often begin by examining the process that led to the settlement's terms to ensure that those terms are "the result of vigorous, arms-length bargaining" and then turn to the substantive terms of the agreement. See, e.g., Murillo, 266 F.R.D. at 479-80; West, 2006 WL 1652598, at *11-12; In re Tableware Antitrust Litig., 484 F. Supp. 2d 1078, 1080 (N.D. Cal. 2007) ("[P]reliminary approval of a settlement has both a procedural and a substantive component.").

1. Negotiation of the Settlement Agreement

Following months of investigations and informal discovery, the parties engaged in a full-day mediation on September 8, 2022 with an experienced wage and hour mediator. (See Wasserman Decl. ¶¶ 7-8.) The parties were unable to reach a settlement agreement at that time. (Id. ¶ 9.) The mediator facilitated continued negotiations over the next two weeks, and the parties accepted a mediator's proposal on September 22, 2022. (Id.) Plaintiff's counsel represents that the parties engaged in thorough informal discovery and discussion prior to settlement negotiations, which were adversarial and conducted at arms-length. (See id. ¶¶ 7, 11.)

Given the parties' representation that the settlement reached was the product of arms-length bargaining following

thorough informal discovery, the court at this stage does not question that the proposed settlement is the result of informed and non-collusive negotiations between the parties. See La Fleur v. Med. Mgmt. Int'l, Inc., No. 5:13-cv-00398, 2014 WL 2967475, at *4 (N.D. Cal. June 25, 2014) ("Settlements reached with the help of a mediator are likely non-collusive.").

2. Amount Recovered and Distribution

In determining whether a settlement agreement is substantively fair to the class, the court must balance the value of expected recovery against the value of the settlement offer. See Tableware, 484 F. Supp. 2d at 1080. This inquiry may involve consideration of the uncertainty class members would face if the case were litigated to trial. See Ontiveros, 2014 WL 3057506, at *14.

"In determining whether the amount offered in settlement is fair, the Ninth Circuit has suggested that the Court compare the settlement amount to the parties' 'estimates of the maximum amount of damages recoverable in a successful litigation.'" Litty v. Merrill Lynch & Co., No. 14-cv-0425 PA PJW, 2015 WL 4698475, at *9 (C.D. Cal. Apr. 27, 2015) (quoting In re: Mego Fin. Corp. Sec. Litig., 213 F.3d 454, 459 (9th Cir. 2000), as amended (June 19, 2000)); see also Almanzar v. Home Depot U.S.A., Inc., No. 2:20-cv-0699 KJN, 2022 WL 2817435, at *11 (E.D. Cal. July 19, 2022) (citing Rodriguez v. W. Publ'g Corp., 563 F.3d 948, 964 (9th Cir. 2009)) ("In determining whether the amount offered is fair and reasonable, courts compare the proposed settlement to the best possible outcome for the class.")

The parties propose a gross settlement amount of

$1,500,000, which includes the following: (1) $5,000 incentive awards for the three lead plaintiffs and $500 for each remaining named plaintiff, for a total of $27,000 in plaintiff incentive awards; (2) maximum attorneys' fees of $500,000, or 33.33% of the gross settlement amount; (3) settlement administration costs of approximately $65,000; and (4) $50,000 for PAGA penalties, of which 75% (i.e., $37,500) will be distributed to the LWDA and the remaining 25% will be distributed to individual aggrieved employees. (See Settlement Agreement ¶¶ 1.5, 1.13, 1.16, 1.21, 1.31; Mot. at 7-9.) After deduction of the incentive awards, fees, costs, and the LWDA's share of penalties, the net settlement amount would be approximately $870,500, to be distributed to class members pro rata based on their number workweeks during the class period. (See id.)

Based on these figures, the average payment per class member is $46.52. Plaintiff estimates that the class claims are worth up to $5,327,023.36. (See Wasserman Decl. ¶ 43.) Plaintiff has provided ample facts and calculations in support of this figure. (See id. ¶¶ 15-43.) The portion of the gross settlement amount allocated to class claims -- $1,450,000 -- constitutes approximately 27.22% of the $5,327,023.36 maximum valuation. This amount is comfortably within the range of percentage recoveries that California courts have found to be reasonable. See Cavazos v. Salas Concrete, Inc., No. 1:19-cv-00062 DAD EPG, 2022 WL 2918361, at *6 (E.D. Cal. July 25, 2022) (collecting cases).

Plaintiff faced numerous risks in the litigation, including proving all elements of the claims, obtaining and

maintaining class certification, establishing liability, and the costliness of litigation on these issues. Investigation uncovered specific factual weaknesses in plaintiff's case, including defendant's use of facially valid timekeeping policies and sophisticated timekeeping software; very low rates of unpaid wages and sick pay based on analyzed payroll records; high rates of meal and rest break premiums actually paid by defendant; facially valid policies for reimbursement of business expenses; significant reimbursements given to class members for cell phone usage; and large amounts of waiting time penalties paid to class members. (See Wasserman Decl. ¶¶ 17-41.) Plaintiff's counsel represents that, given the strength of plaintiff's claims and defendant's potential exposure, the settlement and resulting distribution provides a strong result for the class. (See id. ¶ 51.)

There does not appear to be any "glaring deficiency" in the amount of the common settlement fund reserved for PAGA penalties, see Syed, 2019 WL 1130469, at *7, at least compared to settlements in other wage and hour and PAGA actions, where the parties tend to maximize the total amount of the settlement that is paid to aggrieved employees. See, e.g., Nen Thio v. Genji, LLC, 14 F. Supp. 3d 1324, 1330 (N.D. Cal. 2014) (granting preliminary approval of $10,000 in PAGA penalties out of a total settlement amount of $1,250,000); Garcia v. Gordon Trucking, Inc., No. 1:10-cv-0324 AWI SKO, 2012 WL 5364575 (E.D. Cal. Oct. 31, 2012) (granting final approval of $10,000 in PAGA penalties out of a total settlement amount of $3,700,000).

In light of the risks associated with further litigation

and the relative strength of defendant's arguments and defenses, the court finds that the value of the settlement is within the range of possible approval such that preliminary approval of the settlement is appropriate. The court further finds the method of processing class member claims to be adequate, as each class member's individual share of the settlement is proportional to the number of weeks worked for defendant during the time period covered by the Settlement Agreement.

Counsel are cautioned that because this settlement was reached prior to class certification, it will be subject to heightened scrutiny for purposes of final approval. See In re Apple Inc. Device Performance Litig., 50 F.4th 769, 783 (9th Cir. 2022). The recommendations of plaintiff's counsel will not be given a presumption of reasonableness, but rather will be subject to close review. See id. The court will particularly scrutinize "any subtle signs that class counsel have allowed pursuit of their own self-interests to infect the negotiations." See id. at 782 (quoting Roes, 944 F.3d at 1043).

3. Attorney's Fees

If a negotiated class action settlement includes an award of attorney's fees, that fee award must be evaluated in the overall context of the settlement. Knisley v. Network Assocs., 312 F.3d 1123, 1126 (9th Cir. 2002); Monterrubio v. Best Buy Stores, L.P., 291 F.R.D. 443, 455 (E.D. Cal. 2013) (England, J.). The court "ha[s] an independent obligation to ensure that the award, like the settlement itself, is reasonable, even if the parties have already agreed to an amount." In re Bluetooth Headset Prods. Liab. Litig., 654 F.3d 935, 941 (9th Cir. 2011).

The settlement agreement provides that plaintiff's counsel will seek a fee award not to exceed 33.33% of the gross settlement amount, or $500,000. (Settlement Agreement ¶ 1.5.) If the court does not approve the fee award in whole or in part, that will not prevent the settlement agreement from becoming effective or be grounds for termination. (See id.)

In deciding the attorney's fees motion, the court will have the opportunity to assess whether the requested fee award is reasonable by multiplying a reasonable hourly rate by the number of hours counsel reasonably expended. See Van Gerwen v. Gurantee Mut. Life. Co., 214 F.3d 1041, 1045 (9th Cir. 2000). As part of this lodestar calculation, the court may consider factors such as the "degree of success" or "results obtained" by plaintiff's counsel. See Cunningham v. Cnty. of L.A., 879 F.2d 481, 488 (9th Cir. 1988). If the court, in ruling on the fees motion, finds that the amount of the settlement warrants a fee award at a rate lower than what plaintiff's counsel requests, then it will reduce the award accordingly. The court will therefore not evaluate the fee award at length here in considering whether the settlement is adequate.

IT IS THEREFORE ORDERED that plaintiff's motion for preliminary certification of a conditional settlement class and preliminary approval of the class action and PAGA settlement (Docket No. 44) be, and the same hereby is, GRANTED.

IT IS FURTHER ORDERED that plaintiff's request for leave to amend the operative complaint in order to join the named plaintiffs from the other actions covered by this settlement is GRANTED. Plaintiff has ten days from the date of this Order to

file the amended complaint.

IT IS FURTHER ORDERED THAT:

(1) the following class be provisionally certified for the purpose of settlement:

(a) All current and former hourly-paid or non-exempt employees who worked for defendant within the state of California during the time period from October 12, 2019 through November 8, 2022;

(2) the proposed settlement is preliminarily approved as fair, just, reasonable, and adequate to the members of the settlement class, subject to further consideration at the final fairness hearing after distribution of notice to members of the settlement class;

(3) for purposes of carrying out the terms of the settlement only:

(a) Dorcas-Cothy Kabasele is appointed as the representative of the settlement class and is provisionally found to be an adequate representative within the meaning of Federal Rule of Civil Procedure 23;

(b) the law firms of Mayall Hurley, P.C., SW Employment Law Group, APC, and Lavi & Embrahimian, LLP, are provisionally found to be fair and adequate representatives of the settlement class and are appointed as class counsel for the purposes of representing the settlement class conditionally certified in this Order;

(4) Simpluris, Inc. is appointed as the Settlement Administrator;

(5) the form and content of the proposed Notice of Class

Action Settlement (Docket No. 44-3 at 57-62)) is approved, except to the extent that it must be updated to reflect dates and deadlines specified in this Order;

(6) no later than fifteen (15) calendar days from the date this Order is signed, defendant's counsel shall provide the Settlement Administrator with the following information about each class member: full name; last known address; last known telephone number; dates of employment with defendant as an hourly-paid or non-exempt employee; the number of workweeks worked during the Class Period; the number of workweeks worked during the PAGA Period; Social Security number; and the last known email address;

(7) no later than ten (10) calendar days from the date defendant submits the contact information to the Settlement Administrator, it shall mail a Notice of Class Action Settlement to all members of the settlement class via first class mail. If a Notice is returned to the Settlement Administrator with a forwarding address, the Settlement Administrator will re-send the Notice to the forwarding address. If no forwarding address is provided, the Settlement Administrator will attempt to locate a more current address within three (3) business days of receipt of the returned mail;

(8) no later than sixty (60) days from the date Settlement Administrator mails the Notice of Class Action Settlement, though in the case of a re-mailed notice the deadline will be extended by fifteen (15) days, any member of the settlement class who intends to dispute the number of workweeks credited to him or object to, comment upon, or opt out of the settlement shall mail

written notice of that intent to the Settlement Administrator pursuant to the instructions in the Notice of Class Action Settlement;

(9) A final fairness hearing shall be set to occur before this Court on **February 5, 2024 at 1:30 p.m.** in Courtroom 5 of the Robert T. Matsui United States Courthouse, 501 I Street, Sacramento, California, to determine whether the proposed settlement is fair, reasonable, and adequate and should be approved by this court; whether the settlement class's claims should be dismissed with prejudice and judgment entered upon final approval of the settlement; whether final class certification is appropriate; and to consider class counsel's applications for attorney's fees, costs, and an incentive award for the class representative. The court may continue the final fairness hearing without further notice to the members of the class;

(10) no later than twenty-eight (28) days before the final fairness hearing, class counsel shall file with this court a petition for an award of attorney's fees and costs. Any objections or responses to the petition shall be filed no later than fourteen (14) days before the final fairness hearing. Class counsel may file a reply to any objections no later than seven (7) days before the final fairness hearing;

(11) no later than twenty-eight (28) days before the final fairness hearing, class counsel shall file and serve upon the court and defendant's counsel all papers in support of the settlement, the incentive award for the class representative, and any award for attorney's fees and costs;

(12) no later than twenty-eight (28) days before the final fairness hearing, the Settlement Administrator shall prepare, and class counsel shall file and serve upon the court and defendant's counsel, a declaration setting forth the services rendered, proof of mailing, a list of all class members who have opted out of the settlement, a list of all class members who have commented upon or objected to the settlement;

(13) any person who has standing to object to the terms of the proposed settlement may appear at the final fairness hearing (themselves or through counsel) and be heard to the extent allowed by the court in support of, or in opposition to, (a) the fairness, reasonableness, and adequacy of the proposed settlement, (b) the requested award of attorney's fees, reimbursement of costs, and incentive award to the class representative, and/or (c) the propriety of class certification. To be heard in opposition at the final fairness hearing, a person must, no later than sixty (60) days from the date the Settlement Administrator mails the Notice of Class Action Settlement, (a) serve by hand or through the mails written notice of his or her intention to appear, stating the name and case number of this action and each objection and the basis therefore, together with copies of any papers and briefs, upon class counsel and counsel for defendant, and (b) file said appearance, objections, papers, and briefs with the court, together with proof of service of all such documents upon counsel for the parties.

Responses to any such objections shall be served by hand or through the mails on the objectors, or on the objector's counsel if there is any, and filed with the court no later than

fourteen (14) calendar days before the final fairness hearing. Objectors may file optional replies no later than seven (7) calendar days before the final fairness hearing in the same manner described above. Any settlement class member who does not make his or her objection in the manner provided herein shall be deemed to have waived such objection and shall forever be foreclosed from objecting to the fairness or adequacy of the proposed settlement, the judgment entered, and the award of attorney's fees, costs, and an incentive award to the class representative unless otherwise ordered by the court;

(14) pending final determination of whether the settlement should be ultimately approved, the court preliminarily enjoins all class members (unless and until the class member has submitted a timely and valid request for exclusion) from filing or prosecuting any claims, suits, or administrative proceedings regarding claims to be released by the settlement.

Dated: July 25, 2023

WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE